

INFORMATION

FOR

MY LORD

AND

LADY NAIRN,

DAVID FALCONER

OF

NEW TOWN,

AND

MICHAEL BALFOUR

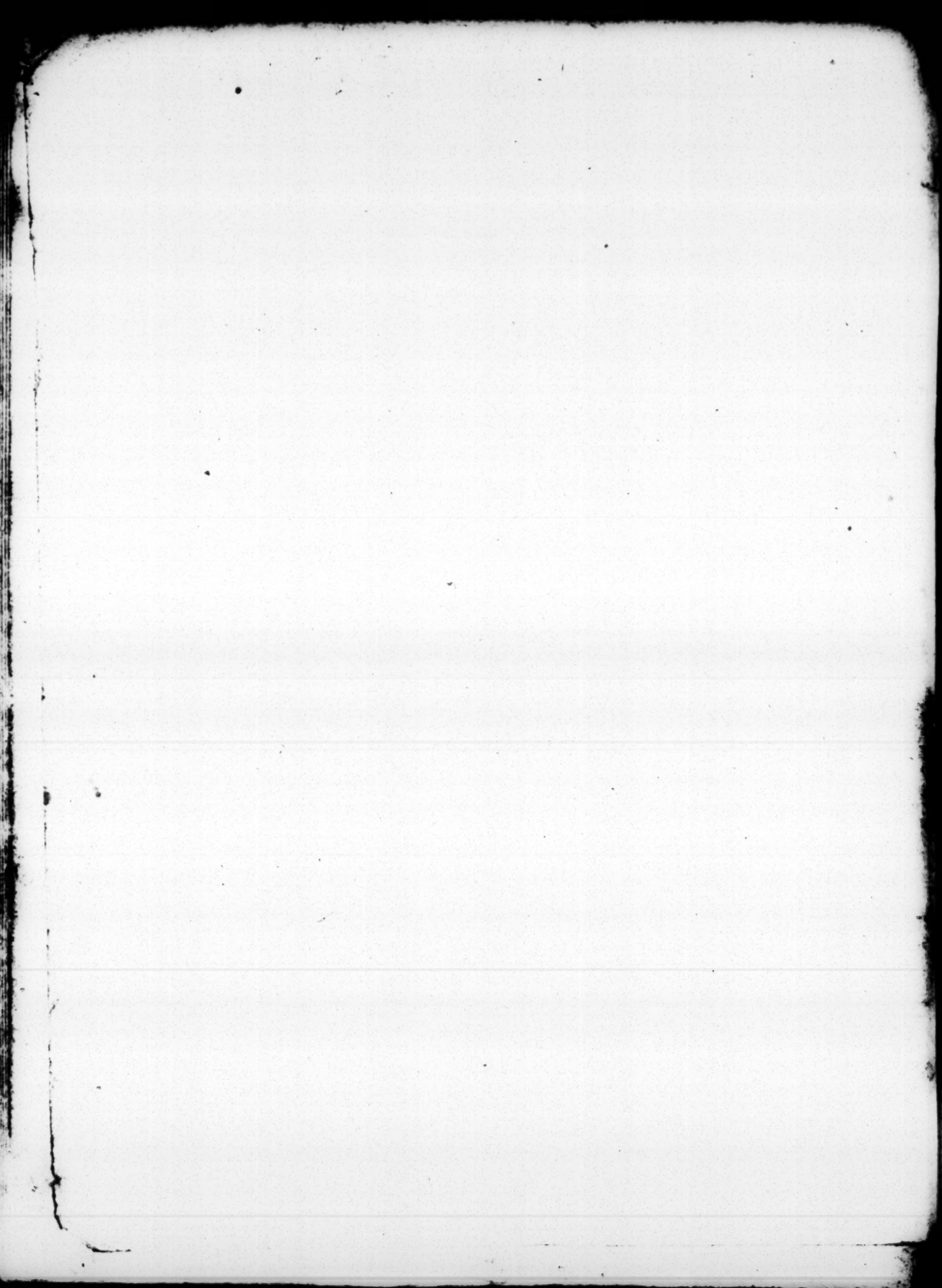
OF

FORRETT,

Against the

EARL of ARGYL.

Printed in the Year, 1690.



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AGAINST THE

EARLE OF ARGYLE.



HERE is a Petition presented by the Earl of *Argyl* to the high Court of *Parliament* founding upon several Acts of *Parliament*, and upon the common Law, and Law of Nations, whereby it is alledged that Judges pronouncing unjust Sentences are punishable, and subsuming that the deceast Earle of *Argyl* was unjustly Forfeited, and desiring that the Heirs and Representatives of the Lord *Nairn*, Sir *David Falconer* of *Newtown*, and Sir *David Balfour* of *Forret*, three of the Criminal Judges who pronounced the Sentence of Forfeiture, may be lyable to this Earle of *Argyl*, for the

the Damage sustained by that unjust Sentence, amounting to 6000 Pound Sterling.

This is a Claime, such as was never offered before any Judicatory within this Kingdom, and is the more extraordinary, that it is presented after the decease of all these Judges who lived and died in Honour and Credit, and the Reputation of Integrity; And it is very hard that any Stain or Blot should be laid upon their Memory, in Relation to their Deportment and opinion in a Proccs, which they themselves could only have cleared, their Heirs being altogether Strangers to it.

Albeit there be several Laws and Acts of *Parliament*, whereby Judges are Punishable for doing Wrong, or Unhonesty, or for refusing to do Justice: Yet that has been a Point so tender, that there cannot be any precedent Instanced, wherein a Judge hath been pursued upon that Ground, so that really these Acts may be reckoned amongst Old and Obsolete Laws, neither does it appear by any of them, that it was designed to give a Party an Interest to pursue for Damages by unjust Sentences; but that a Party might Complain to the King and his Council; and that a Judge being found guilty might be punishable in his Person and Goods, but without any Benefit to the Party, except his Charges in the Complaint, the fine to be imposed upon the Judge being Penal, which with all others of the like Nature doth belong to the Fisk.

The Earle of *Argyl* who offers the Complaint, does found the same upon the Claime of Right, and Restitution of the Forfeiture, which may be a good ground for Possessing or Affecting his Fathers Estate, but it were of very Dangerous Consequence, that the Restitution of a Forfeiture by Act of *Parliament*, should make the Judges obnoxious who pronounced the Sentence; this is not the first Restitution in *Parliament* by way of Justice, our Records are full of the like, but none who were ever so restored, did pretend in this or any bygone Age, that the Judges who pronounced Sentence should be Culpable; and if it were sustained in this Case, there is a prospect of Restoring several Hundreds of late Forfeitures, what then should become of the Judges who pronounced these? Or who would undertake to serve as Judges under any

any Government, if all posterior Reductions or Impungning of their Sentence should make their Estates lyable to Damages, and what is now Acclaimed in the Case of Criminal Judges, were much more Competent against Judges in Civil Matters; All the Laws Cited having a special Relation to Civil Processes, and therefore our Predecessors in making of these Laws having foreseen the Dangerous Consequences of allowing Civil Actions to Parties, who either really were, or apprehended themselves to be Injured. They did not place any right Interest or Benefite to the private Parties prejudged, but only that they might be Informers, or complain to the King and His Council, and obtain the Judge to be punished at the Kings Pleasure, either in his Person, Fame or Goods: Yet so as no share did fall to the Party Complainer by that Process, and if it were not so, how miserably would all the Fences and Securities of our Properties be unhinged, for after such a precedent, there would remain nothing, but to run throw the records of Council, Session and Justice Court, and under the Notion of Damages, by the Sentences of these Judicatories, the Estates of all the Judges thereof; whose Sentences were afterwards Reduced or Rescinded might be wholly exhausted and carried away; neither could the Members of *Parliament* acting in a Judicative Capacity be secured from the Consequences of such a Preparative.

It were unnecessary and unfit to debate any thing, in relation to the Procedure, against the deceased Earl of *Argyl*, whom the Parliament hath Restored; But what ever Action or Complaint is competent to him, the like will be competent to all who shall be Restored by way of Justice; For albeit there may not appear the like clear and evident Grounds for their Restitution, yet being Restored by way of Justice, their Forfeitures must be acknowledged to have been unjust; And no Party will be admitted to plead any point that might seem to support the Justice of the sentence of Forfeitures; And it were impossible to fix and settle a clear Rule or Limit, which of the Rescinded Sentences were more or less unjust; And in what case the Judge should be lyable or Free after such a Restitution, especially where Restitution is by a publick Act of Parliament, without Process or Citation of Parties, which is equal in the Earles case, And all others who
shall

shall be restored that way ; For albeit the Heirs of the Judges be now called, yet there being once a Restitution, without calling of Parties, all Defence is now precluded in Relation to the Proceſs, which in deference to the Act of Parliament, muſt be presumed, and plead as absolutely Unjuſt in the ſame Terms , as it is expreſſed in the Restitution.

Theſe general Grounds being premiſed, It is Answered for the Defendants, *1mo*: That albeit the Earl did actually Reſent his Father as Heir and Executor , to whom he is only Apperand Heir by his Restitution , and thereby hath no ſufficient Active Title to purſue And that the Defender did Reſent theſe Judges upon the paſſed Titles which they deny ; Yet the doom of Forfeiture can be no Probation, that theſe three Judges, or any ſingle one of them did give their Vote or Opinion, for ſuſtaining the Relevancie ; But only that the Relevancy was ſuſtained by the Plurality, which does not prove that the Plurality was made up by the particular Vote or Votes of any One or More of theſe three Judges , which might have been by the Opinion of others , and can at moſt but conclude one of the three. And it cannot be diſtinguiſhed or known, which of the three was the perſon ; And it is a known Principle , That *Actore non probante absolute ſurrens*, Neither can any Probation of their Acceſſion be ſuſtained unless it were proven under their own hands , or by their own acknowledgment, That they were Conſenting or Concurring in ſuſtaining the Relevancie ; Becauſe , albeit Witneſſes could be received in proving of that point , which is denyed ; There is none living who can bear Teſtimony in that Matter , except two Judges with themſelves in the ſame Court And the Queſtion being, who were the Judges guilty None of them can be ſuſtained to liberate themſelves by loading others ; And for this cauſe, in the Tryal by an Aſſize of Error, upon the 63: Aſſ 8: Par: 7a: 3: It is provided , That the Aſſize ſhall be called and inquiry made at them , if they did all agree , whereby no particular Aſſyſour could be ſingled out from the reſt , much leſs a guilty fixed upon any Deſunct , who was not to answer for himſelf.

2da Our Municipal Laws for puniſhment of Unjuſt or Negligent Judges, are all in Relation to the Civil Adminiſtration of Juſtice between

betwixt Party and Party, and not one of them does relate to the Justices, in Criminal Matters, and on the contrary it is evident, that by our Law, no Judges or Assysours, passing upon a Criminal Process, can undergo any punishment if they Condemn, but only in case they acquit the Pannell, and therefore there is an Assyse of Error provided by the said 63 *Ad.* 8. *Parl. Ja.* 3. In case the Inquest contrary to manifest knowledge, do acquit the Pannel, but no punishment on the other hand; And the reason is, because the *Sympathie* of Humane Nature, is thought sufficient to restrain both Judges and Jurors from Condemning the Innocent, and this presumption hath so satisfied and filled the minds of the Lawgivers, that there is no Statute providing any Remedy, or Punishment against the Judge in that case,

3thio. In so far as the Petition is founded upon the Acts of *Parliament* of this Kingdom, there doth not arise any Interest or Damage to a Party prejudged by the Sentence of any Judicator how unjust soever, but the sum of all the Acts of *Parliament* Lybelled in relation to the Judges, amounts to this, That Unjust and Negligent Judges may be punished by the King & his Council in their Persons, Goods or Fame, according to the quality of their Offence at the King's Pleasure, and where ever a Party is in general appointed to be punished, any Fine or Pecunial punishment that can be imposed by that Law, doeth fall to the Fisk, unless the Law appoint a particular Application in whole or in part to the Person prejudged; so that whatever were chargeable upon the Judges at the Instance of the King's Majesty, there is no Action competent at the Instance of any Party for a private Interest, or at most only for the Charges in Accusing and Prosecuting the Judge, and for instructing this defence without repeating the several Acts of *Parliament* founded on, the same are desired to be considered as they are Stated in the Bill, without the Commentaries that are affixed upon them expressly Contrare, and Inconsistent therewith; And it is not pretended that any of these Acts, do expressly found an Interest to the Party, but after a full Relation of the Acts, there is subjoyned a Commentary on them in these words; Which no doubt doth farther import the Parties damage: A rare Assertion and well founded! that beside the Penalties exprest in the Act
there

there is no doubt a farther Penalty imported thereby; and there is more to make out this Position, then a bare Assertion, it is not urged from any former Practice or Precedent, for the like was never pretended: It is not alleged that in other Laws, of this, or any other Nation, where there is a special Penalty exprest, or an Arbitrary punishment at the Pleasure of the Judge or Sovereigne; that beside the Special or Arbitrary punishment exprest, there shall be a separate distinct Penalty competent; so that this Position, upon which the weight of the whole Acts of *Parliament* cited, is founded, being without the least shadow of Law, Reason, or Precedent, the conclusion upon it must fall in Consequence; And the Defenders do upon good Ground conclude, that seeing these Acts do not contain any Clause or Provision in Favours of the Party Injured, That *No Doubt* they do not import any such Interest in Favours of the Party, and their Assertion is confirmed by the Acquiescence of all, who in this or any former Age have been Injured or Prejudged by the Sentence of any Judicator, who have never pretended to such a Redress; and the Defenders Assertion is also confirmed by the Example of all *Peoples Laws*, which do never import any farther Penalty then what is specially exprest: And without question, the Earl's Claime is meerly *Perjury* against the Heirs of the Judges, who are no ways enriched by his loss or any Consequence of that Sentence.

4th. Albeit these Laws might infer a Punishment against the Judges, yet the same being *mere pena*, and falling to the Fisk, may be freely discharged by the King, which was done in this case, in as far as the Sentence and Process of Forfeiture, was approved by the Act of Parliament, 1685: and by the 31: Act of that Parliament. All the Judges of the Nation, Civil or Criminal, were indemnified and secured anent their Actings in his Majesties Service, and that fully, as if every particular Crime and Misdemannour were specially exprest in a Remission, under the Great Seal, Requiring all Judges to interpret the said Indemnity in the most Ample and Favourable Sense: Which Act doth fully secure the Judges as to any Claim, that can arise either to the Fisk, or even to a private Party, by any Crime or Misdemannour Committed or Ommitted in their Office; A

no Rescission of the Forfeiture can found any Action against the Judges who are as amply exonerated, As if they had been pursued, and undergone the severest penalty of the Law.

510. In so far as the Lybel is founded upon the Common Law, it does appear that the Earl has laid very little weight upon it, seeing there is no special Citation adduced from that Law, for inferring the Conclusion; And indeed there was no reason to Rely upon it; For, 1. Albeit by our Customes great Recourse be had thereto, where, we have no positive Law of our own; yet in this and all other cases, where we have special Statutes, we are to be Regulate thereby, and whether the Penalties therein exprest, be more or less then what is contained in the Civil Law, it is of no importance; so that if by these special Penal Laws of this Nation, mentioned in the Bill, the Representatives of the Judges be not lyable, they cannot be subjected to any Punishment by the provision of the Civil Law. 2. It is true that several Texts in the Civil Law do subject an unjust Judge to severe penalties, which do distinguish two cases, either the same is pronounced *per imprudentiam*, in which case the Judge is not simply lyable *in estimationem litis*, for the full dammage and interest. *Sed in quantum Religioni judicantis visum fuerit* *: Or otherwise, the unjust Sentence was pronounced by fraud and corruption, in which case, the Judge was punished in the full dammage and interest and infamy: But by that Law, Fraud was never presumed*, So that however palpably unjust the sentence did appear, yet the presumption was for the Judge, that it was *per imprudentiam aut imperitiam*, unless there were a positive probation, that there was Corruption; And the Law was so favourable to the Judge, that it did allow him to purge himself of the suspicion of corruption by his own Oath *. And did further most severely punish the party, who did slander the Judge, and subjected him to the punishment, to which the Judge should have been lyable, so that the presumption does still ly for the Judge; that any Error that was committed by him; was merely *per imprudentiam*, and the punishment thereof was Arbitrary. But all Writers upon the Title, *de penis male Judicantium*, do agree that the practice generally of all Nations have

* l: ult: ff. de
extraord: co-
quis: Inst: de
oblig: que
quas: ex de-
lict: in prin:

* l: 6: C:
de dolo:
l: 13: § 1:
ff: de pro:
l: 51: ff:
pro socio.
* Nov:
124: cap:
2.

†Perezius recede from that severity exprest in the Law||.

de pœ: It is therefore a very injurious Censor and Reflection, That the
Jud:n: 5: Judges did maliciously co-operate with Popish Designs, in condemn
Christene. ning the innocent, seing all of them lived and dyed without the least
us vol: 4: suspicion of declyning from the *Protestant Religion*, in which they were
Decis: 95: Educate; and it is the common Interest of Mankind, to interpret the
n: 4: Ar- Actions of other Men in the most favourable and benigne Sense they
gentre ad can bear: Every Person who weighs Humane Frailty, *And consider*
consuetud himself likewise subject to *INFIRMITIES*, ought to construct all doubt
Britan. ful Actions in the best sense, and never to presume Malice or Fraud;
Art: 33: no Man desires his own Actions to be so constructed, *Et quod tibi sum*
4: v: Gro- *non vis, alteri ne feceris.*
enweg: de
Leg. A-
brog: ad

Ti: Inst: 3tio. The Civil Law did restrict all penal Actions, and did allow
de ob: ex the same only to be pursued against the person guilty; but there was
quasi: del. no Action competent against his Heirs, except in two cases, where
either the Action had been pursued against the Defunct, and pro-
ceeded the length of *Litisecontestation*, whereby it was no more consi-
dered as a Penal Action, but as a Civil Debt, *ex quasi contractu*, or o-
therwise, in case the Heretage were enriched by the Defuncts Crime.
And in that case, there was only Action granted, in so far as the Heir
was enriched, *in quantum ad heredem pervenit ut turpe lucrum extorquetur*.
But in all other cases, (*perduellion*, and the Action called in Law *condictio*
Furtiva, only excepted) *mortalitate extinguitur crimen*; This is a point
so clear, That it is beyond all Debate, being plainly exprest by in-
numerable Texts in the Civil Law, so fully, that there does not arise
any Contraversie in that point amongst Writers or Practitioners*.

* L: nn: If then this Action be acknowledged to be a penal Action, it is
C: ex del: ly personal, and it cannot with any shadow of Reason be contr-
def: l: 5: verted, that the same is penal against the Judges, or their Heirs
ff: de Ca- because the foundation of the process is the punishment of an alledg-
lum: l: 19: ed Fact and Deed of the Judges, whereby they nor their Heirs are
ff: quod enriched; And there are many Actions wich are not pen-
mœus
causa l:
Indene-
rarius 23: *§ hanc*

actionem ff: ad l: aquil: l: hanc actio 13: ff: de serv: Corrup: l: 9: § 1: ff: quod fals: tut: l: 3: § pen: ff: si
fals: mod: l: 1: de Priv: del: l: 2: § ult: ff: vi bon: rapt: l: in honorariis 35: de obl: & Act pupill:
Ill: § 1: de Reg: Jur: § ult: just. de obl: quæ quasi ex del: Inst: de perpet: & temp: Act § 1,

upon the part of the Pursuer, who claims nothing but damage and interest, *Quod à patrimonio suo abest*; And yet they are reckoned penal, because in so far as concerns the Defender they are such, his Fortune not being enriched by the Pursuers Damage; And therefore most of all the Texts, which mention penal Actions to be personal, the Examples and *species facti*, contained in these Laws are such, as are only for Damage and Interest upon the part of the Pursuer, but Penal upon the part of the Defender, as will be evident to any who shall consider the Laws. And the general Rule of Lawyers in this matter, is, That *Quoties actio factum punit & in dolum concepta est*, and is pursued against him who is not enriched by the Fraud: The Action is Penal, and not competent against Heirs, albeit upon the Pursuers part, it may seem *rei persecutoria* for Damage and Interest *. And albeit the Law cannot enumerate every case, to apply the general rule to it; Yet it is particularly decided *l. 16. ff. de Judiciis*; That the Heir of a Judge cannot be pursued, *Julianus autem in heredem Judicis, qui litem suam fecit, actionem competere putat, quæ sententia vera non est, & à multis notata*. And what shadow of pretence can remain to pursue the Heir of a Judge, who is secured by innumerable Texts, upon that general ground, that no Penal Action is competent against Heirs; And by a particular express Law, the Heir of a Judge is comprehended, and hath the benefite of the other Laws, which liberate the Heirs of all Delinquents.

410. As by the Civil Law, the Heir of no Delinquent could be pursued; The like holds in our practice, and by our Statutes, and for verifying of this Alledgeance, let all the Crimes which are punishable by our Law be considered, and see if any one of these can be instanced which may found an Action against the Heir of the Delinquent. except in *quantum pervenit*, conform to the Civil Law; Or let the Earl condescend upon any Action of the like Nature, that was ever sustained or acclaimed: And why is it, that our Law does require a special Statute to make Treason punishable, after the death of the Traitor, by an Action against his Heirs? But because that was a speciality, wherein that Crime was differenced from all others. and all Processes of Treason against the Heirs of Defuncts, are expressly founded

d. l. 9: § . :
ff quod
fals. tur.

founded upon the said Act of Parliament, which renders it beyond Debate, that all other Crimes are extinguished by Death. And therefore, although Murder and Manslaughter be amongst the most odious of all Crimes, and whereby frequently great damages arise to the Heirs, yet there was never any action for Assythment, or any other effect sustained, or intended against the Heirs of the Murderer.

The Earl appears to have foreseen the inevitable force of this Defence, and for obviating thereof, he doth in his Bill, insist upon two Acts of Parliament, viz: 49: Act Parl: 11: Ja: 6: and 69: Act 6: Parl: Ja: 5: By the first cited of these, it is provided, That whoever maliciously accuses another of Treason, if the Party accused be acquitted the Accuser incurs the pain of Treason; which in all Reason (as is alleged) ought to take place against these who maliciously condemn the innocent; and thereby would pretend, that the Judges were lyable to be punished as Traitors. And by the other Act of King James the Fifth, it is provided, That process of Treason may be pursued against the Heirs of the Traitor; but the Earl of his meer bounty, does restrict the effect thereof to Restitution.

To these pretences it is Answered, that it was a rare stretch of Invention, to find out an Argument from these Laws against the Judges or their Heirs, to make them lyable according to the desire of the Petition, and to which the Earl was driven by the view of the Obvious and Unanswerable Defences above written, especially, *That all crimes are extinguished by death*; therefore it was necessary that this Crime should be Screwed up to the pitch of Treason, that the Heirs might become lyable, and in effect Forfeited by a greater Stretch then the former.

It is then to be considered by what Reason this pretence can be supported, which must necessarily bear the weight of the whole Claim. And *Imo*. it is uncontraverted that Penal Statutes are not to be extended *de Casu in Casum**, and tho the Law affix a great Penalty to a small Crime, it is to be inflicted, *licet durum sit, quia ita Lex scripsit*. But to pretend from thence that every Crime as Heighnous of its own Nature, or having any Resemblance to that which is exprest, should be punished by the same severity, is such a Notion, as never formerly entered into the Head of any Lawyer; this were indeed to render every

* L: 42: ff: de poen: l: 19: ff: de lib: & posthum: hared: instit.

every Man uncertain in his Life or Estate, and to make our *Penal Laws* altogether Arbitrary at the Apprehension of every Judge, according to his Opinion and Estimation of the Crimes Lybelled. 2do. There can hardly be two Crimes, having less of Parity or Resemblance one to another, then that of a *Malicious Accuser* with an unjust Judge: What Parallel can be imagined betwixt these two? A *Malicious Accuser* is a Person who Officiously, and Unnecessarily obtrudes himself to Prosecute a Person for his Life and Fortune; a Judge is bound by the Necessity of his Office to give a Sentence, which tho it may be found Unjust; yet it is presumed to be *per Impertiam, aut Imprudentiam*, and not by his Malice, Fraud or Corruption, as is above mentioned: And that which is mainly considered in that Statute, is the Officiousness of the Accuser of an Innocent Person, and therefore tho His Majesties Advocate should prosecute a Party with Rigour, it is not understood Malice, because he is in his Duty or Office, so the Judge deciding, is in his Office, but the Fault is a Miscariage: Which in all Law is esteemed to be an Errour in his judgement; For by the *Novel Constitutions*, a Judge was only bound by his Oath *de Fidelis*, to swear that he should decide *secundum, quod illi visum fuerit justius & melius*, and its from that Reason that the Custom of all Nations have exeemed Judges from any Process, upon their Sentences; except in the case of Fraud, or Corruption; *Artib: Hodie C: de Judiciis.*

3tio. Let it now be supposed that the imaginary Parallel betwixt the Judge and Officious Accuser, could subsist, which is impossible, yet that could found no Action against the Heir of the Judge, upon King James the Fiths Act, for that Act does only mention the case of *Lese-Majesty*; And does provide that processes of Treason might be pursued against Heirs, conform to the Common Law, so that it must be considered, what was provided by the Common Law, as to pursutes of Treason, against the Heirs of the Traitor: It is true that both the Civil Law, and Ours, do recede from the general Rule, That all crimes are extinguished by Death; In the special case of *Lese Majesty*, but neither of these do Authorize processes to be pursued against the Heir upon Statutory Treason, as is clear by the last Law, ff: *Ad legem Juliam majestatis.* *Is qui in reatu decedit integri status deced:* Ex-

negatur

tinguitur enim crimen mortalitate , nisi fortè quis majestatis reus fuit , hoc crimine , nisi à successoribus purgetur , hereditas Fisco vindicatur , non quisquis legis Juliae majestatis reus est , in eadem conditione est , sed perduellionis reus est , hostili animo adversus rempublicam vel principem actus ceterum si quis ex aliâ causâ legis Juliae majestatis reus sit , morte liberatur. By which it Appears plainly , that every Treason not competent to be pursued against the Heir of the Traitor ; that which is specially called *Lèse-Majesty*, or *Perduellion* , against King or Common-wealth ; But all other kinds of Treason , from the Statute against False Accusers, are extinguished by Death.

410. But even suppose also, that as the Crime lybelled were Treason so the pursuit were Competent against the Heirs, what Interest can arise to the Earl of *Argyl* by this means, the King's Majestic may indeed pursue a Forfeiture, and Gift it to the Earl ; but such Proceedings are not so much in Vogue, but by what pretence they should by a seeming Condescendence Restrict the Claim of Forfeiture to Damage and Interest, passes all understanding, for if Treason be Incurred, the Action arises not to the Earl, nor can Damage be pursued by him upon that Ground, that the Heirs are liable as in the Case of Treason, and after all the Earls pretended Bounty in restricting the Lybel, is wholly unprofitable to the Heirs, the Legacies Acclaimed being far beyond the Value of the Defunct's whole Estates.

It is therefore Humbly and Confidently expected from the Wisdom and Justice of the High Court of Parliament ; That no Countenance or Encouragement will be given to the stretched pretences in the Claim, which are destitute of all Foundation in Law Civil or Municipal, and without Example ; And which carry along more pernicious Consequences to the Fame and Reputation of Judges who Honour and Credit, to the Estates of their Innocent Heirs, and to the Lives and Fortunes of such as are Alive, then ever was pointed out in any former Case, in this, or any other Nation, under the Sun.